

No. 11885.

IN THE
United States Circuit Court of Appeals
FOR THE NINTH CIRCUIT

The Tug ROCONA, her engine, tackle, apparel and furniture, JOHNSON WESTERN COMPANY, a corporation, and CASE CONNOLLY COMPANY, a corporation,

Appellants,

vs.

GUY F. ATKINSON COMPANY, a corporation,

Appellee.

BRIEF FOR APPELLEE.

McCUTCHEN, THOMAS, MATTHEW,
GRIFFITHS & GREENE,
HAROLD A. BLACK,
GEORGE E. TONER,

704 Roosevelt Building, Los Angeles 14,

Proctors for Appellee.

FILED
JUN 19 1948

TOPICAL INDEX

	PAGE
Statement of facts.....	1
Questions involved	5
Summary of argument.....	6
Argument	8

I.

The District Court's decree is supported by the strongest presumption of correctness.....	8
---	---

II.

The District Court's findings are not only supported by substantial evidence, but also are the most reasonable inferences to be drawn from the evidence.....	12
A. Appellee was without fault as to loading and trim of the barge	12
B. Appellee was without fault as to maintenance of the mooring float	12
C. Appellants were at fault.....	14
1. The barge was towed at an excessive speed as it approached the float.....	14
2. The tug was improperly maneuvered into and over the float	16
D. The damage was caused when and because the barge was towed over the float. There is no other reasonable explanation	19

III.

The trial court correctly applied the doctrine of res ipsa loquitur in concluding that appellants were negligent.....	21
---	----

IV.

Conclusion: The decree should not be disturbed.....	27
---	----

TABLE OF AUTHORITIES CITED

CASES	PAGE
Bornhurst v. United States (C. C. A. 9th, 1947), 164 F. (2d) 789, 1948 A. M. C. 53 (cert. den. U. S., L. Ed. (Adv.), 68 S. Ct. 789).....	8, 9
Calchini v. Bliss (C. C. A. 9th, 1937), 88 F. (2d) 82, 1937 A. M. C. 203.....	11
Crowley Launch & Tugboat Co. v. Wilmington Transportation Co. (C. C. A. 9th, 1941), 117 F. (2d) 651, 1941 A. M. C. 449	11
Diamond Cement, The (C. C. A. 9th, 1938), 95 F. (2d) 738, 1938, A. M. C. 757.....	8
Drain v. Shipowners & Merchants Tugboat Co. (C. C. A. 9th, 1945), 149 F. (2d) 845, 1945 A. M. C. 892.....	11
Ernest H. Meyer, The (C. C. A. 9th, 1936), 84 F. (2d) 496, 1936 A. M. C. 1179 (cert. den. 299 U. S. 600, 81 L. Ed. 442, 57 S. Ct. 193).....	9
Golden Star, The (C. C. A. 9th, 1936), 82 F. (2d) 687, 1936 A. M. C. 692.....	10
Grauweiler Trans. Co. v. Gallagher Bros. Sand & Gravel Co. (C. C. A. 2d, 1946), 153 F. (2d) 384, 1946 A. M. C. 221....	21
Heder v. United States (C. C. A. 9th, 1948), F. (2d), No. 11767 (decided May 5, 1948).....	8, 9
Heranger, The (C. C. A. 9th, 1939), 101 F. (2d) 953, 1939 A. M. C. 369.....	10
Hurt v. Susnow (1948), 85 A. C. A. 251.....	26
Indien, The (C. C. A. 9th, 1934), 71 F. (2d) 752, 1934 A. M. C. 1050	9
Jesionowski v. Boston & Maine R. Co. (1947), 329 U. S. 452, 91 L. Ed. 416, 67 S. Ct. 401.....	23, 24
Johnson v. United States (1948), U. S., 92 L. Ed. (Adv.) 360, 68 S. Ct. 391, 1948 A. M. C. 218.....	23, 24
Johnson v. United States (C. C. A. 9th, 1947), 160 F. (2d) 789, 1947 A. M. C. 765.....	9, 24

Liggett & Myers Tobacco Co. v. De Lape (C. C. A. 9th, 1940), 109 F. (2d) 598.....	26
Lillig v. Union Sulphur Co. (C. C. A. 9th, 1937), 87 F. (2d) 277, 1937 A. M. C. 59.....	11
Mable, The (C. C. A. 9th, 1932), 61 F. (2d) 537, 1932 A. M. C. 1618	10
Matson Nav. Co. v. Pope & Talbot (C. C. A. 9th, 1945), 149 F. (2d) 295, 1945 A. M. C. 767 (cert. den. 326 U. S. 737, 90 L. Ed. 439, 66 S. Ct. 46).....	8
Meintsma v. United States (C. C. A. 9th, 1947), 164 F. (2d) 976, 1948 A. M. C. 144.....	8, 9
Pac-American Fisheries Inc. v. Hoof (C. C. A. 9th, 1923), 291 Fed. 306, 1923 A. M. C. 1180.....	8
Petterson Lighterage & Towing Corp. v. New York Central Railroad Co. (C. C. A. 9th, 1942), 126 F. (2d) 992, 1942 A. M. C. 345.....	11
Portland Stevedoring Co. v. Wegener (C. C. A. 9th, 1947), 162 F. (2d) 830, 1947 A. M. C. 1070.....	10
Puratich v. United States (C. C. A. 9th, 1942), 126 F. (2d) 914, 1942 A. M. C. 611.....	10
Shangho, The (C. C. A. 9th, 1937), 88 F. (2d) 42, 1937 A. M. C. 425 (cert. den. 301 U. S. 705, 81 L. Ed. 1359, 57 S. Ct. 938)	11
Stetson v. United States (C. C. A. 9th, 1946), 155 F. (2d) 359, 1946 A. M. C. 900.....	8, 9
Stockton Sand and Rock Co. v. Bundeson (C. C. A. 9th, 1945), 148 F. (2d) 159, 1945 A. M. C. 659.....	11
Sweeney v. Erving (1913), 228 U. S. 233, 240, 57 L. Ed. 815, 33 S. Ct. 416.....	23, 24, 25
Tawada v. United States (C. C. A. 9th, 1947), 162 F. (2d) 615, 1947 A. M. C. 947.....	8, 9

United States v. Lubinski (C. C. A. 9th, 1946), 153 F. (2d) 1013, 1946 A. M. C. 483.....	8
Vileski v. Pacific Atl. S.S. Co. (C. C. A. 9th, 1947), 163 F. (2d) 553, 1947 A. M. C. 1707.....	10
Wilson v. Interocean S.S. Corp. (C. C. A. 9th, 1947), 163 F. (2d) 459, 1947 A. M. C. 1666.....	10

STATUTES

Admiralty Rule 46½ (28 U. S. C. A., Sec. 723, Rule 46½).....	11
Federal Rules of Civil Procedure, Rule 52A (28 U. S. C. A., Sec. 723c, Rule 52A).....	11

No. 11885.

IN THE

United States Circuit Court of Appeals
FOR THE NINTH CIRCUIT

The Tug ROCONA, her engine, tackle, apparel and furniture, JOHNSON WESTERN COMPANY, a corporation, and CASE CONNOLLY COMPANY, a corporation,

Appellants,

vs.

GUY F. ATKINSON COMPANY, a corporation,

Appellee.

BRIEF FOR APPELLEE.

This appeal is from an Interlocutory Decree and Order of Reference which adjudged Appellants in sole fault for damage caused to Appellee's BARGE No. 4414 when it was moored by Appellants' Tug ROCONA to Appellee's mooring float.

Statement of Facts.

On March 31, 1945, BARGE No. 4414, loaded with rock was towed by the Tug ROCONA from Catalina Island to appellee's mole construction job at Los Angeles Harbor.

BARGE No. 4414 is about 120 feet long with a 40-foot beam. Loaded, it had a gross weight of 1200 tons, a freeboard at the bow of 3 feet and draft of 9 feet. The

freeboard at the stern was about 18 inches. The barge has a "rake" bow extending diagonally downward and backward to flat bottom. At each corner there is a "bitt" or "Samson post." The bottom planking is 12 inches wide by 4 inches thick. The bottom planks are described by number commencing at the bow end of the flat bottom. (Thus plank number 22 is twenty-two feet from the bottom of the rake.)

The float to which the barge was to be moored is a solid wooden block ten feet square by four feet thick, anchored in the harbor near the mole. To the top surface of the float is fastened a large "eye" or "U bolt," made of 2-inch diameter steel. It extended upward about 12 inches from the "deck" of the float. A steel cable or "mooring pendant," about 40 feet long, was attached to the "U bolt." An "eye" or loop was spliced in the free end of the mooring cable so that when the barges were moored the eye could be slipped over the barge's Samson post and the towing bridles cast off. An anchor chain or cable, about 75 feet long led to a similar "U bolt" in the under side of the float.

When BARGE No. 4414 and BARGE No. 4412 were delivered to the ROCONA no employee of appellee was aboard either barge or tug. They were towed tandem from Catalina Island to the east entrance of the breakwater where they arrived at 11:30 p. m. At 11:40 p. m. the tug and tows cleared the anti-submarine net gate. At 12:10 a. m. the first barge, BARGE No. 4412, was turned over to the tug DISPATCH, the towline to BARGE No. 4414

was shortened, the tug's deckhand, equipped with a flashlight and pike pole, was put aboard the tug, and the ROCONA proceeded toward the mooring float. The tug captain saw the mooring float at about 1000 to 1200 feet as he turned his spotlight on it. When the barge was from 100 to 200 feet from the float the tug captain shut off his power and by maneuvering the barge, caused its forward momentum to bring it toward the float so that the deckhand standing at the starboard forward corner of the barge could reach down with his pike pole and pick up the mooring cable. At no time did the tug "back down against" the barge to stop its forward motion. The deckhand slipped the mooring pendant on the Sampson post, cast off the towing bridle and reboarded the tug. They made a "circle" of the barge and seeing nothing wrong, returned to their berth.

Jackson, appellee's night superintendent (from 12:00 to 4:00 a. m.), shortly after the barge was moored, made his rounds in a speedboat to see that the several barges were in apparent good order. At that time he noticed nothing unusual. An hour or an hour and a half later, when he next made his rounds, he discovered BARGE No. 4414 listing "quite badly" and dumping her load of rock. It was explained that free water in a barge of this type will run to one side and cause the barge to list until part of the load is lost, when the barge will right herself and the water will run to the other side, the process being repeated until the barge sinks or capsizes. Appellee's employees attempted to prevent the barge from sinking

with her load of rock by calling for another tug, but the bulk of the rock cargo was lost.

The following day BARGE No. 4414 was capsized and it was discovered that a hole the size and shape of the mooring float's "U bolt" had been punched through the barge's four-inch bottom planking. The leak from a hole this size would cause the barge to begin to list in a half hour to an hour. The hole was about five feet inboard from the starboard side and through planks numbered 22 and 23. In plank numbered 21 adjacent to the hole there was a gouge about 2 inches wide and a half inch to an inch deep. This "gouge" or "groove" was the after portion of a deepening scratch extending diagonally forward from the hole for about seven or eight feet. The distance from the hole to the starboard forward Sampson post, measured around the rake equalled the length of the mooring pendant.

At all times involved the wind was negligible and ordinary harbor currents and surges were present. At 11:30 p. m. the tide was at a height of 4.91 feet; by interpolation at 12:10 a. m. it was at 4.42 feet; at 12:45 at 4.1 feet.

Appellee seeks in this action to recover its damages to the barge and cargo alleging that the damage was caused by negligence of appellants' crew in mooring the barge. The District Court, by its interlocutory decree, found appellants negligent and in sole fault. This conclusion was reached by the Court after weighing the inferences to be drawn from circumstantial evidence of negligence,

and the inference of negligence from application of the *res ipsa loquitur* doctrine against the inferences of no fault that appellants urged should be drawn from the testimony of their tug's crew.

Questions Involved.

Appellee believes that the sole question involved in this appeal is:

Was the District Court correct in finding that appellants' tug crew negligently caused appellee's damage?

Appellee urges:

(1) that appellants were proved to be negligent by:

(a) direct evidence of negligence;

(b) the appropriate inference of negligence arising from application of the doctrine of *res ipsa loquitur*; and,

(2) That appellants' negligence was the sole and proximate cause of appellee's damage and loss.

Summary of Argument.

This Court has on many occasions indicated that it will not disturb a finding by the District Court which is supported by evidence and not clearly erroneous.

In this case, the facts and circumstances, viewed objectively, indicate that appellee's barge was caused to run over a mooring float by negligence of appellants' crew. Appellants' crew testified that they had moored the barge properly, and without incident. The District Court found that the "physical facts spoke louder than the words of the witnesses" and (basing its decision on circumstantial evidence of negligence as well as the inference from application of the doctrine of *res ipsa loquitur*) found appellants negligent and in sole fault. Appellee urges that this finding is not only based upon substantial evidence, but also is the most reasonable inference to be drawn from all the evidence.

The "thumbprint" of the mooring float, a hole the size and shape of the "U" bolt of the float (either the top eye to which the mooring cable was attached or the similar bottom eye to which the anchor chain was affixed) a distance from the Sampson post, measured around the rake of the barge, just equal to the length of the mooring cable, was found punched through the bottom planking. A deepening scratch, some seven or eight feet long, extending forward from the hole indicated that the barge was stopped by allowing it to come up sharply to the scope of the mooring cable and anchor chain. The barge was inspected by appellee's night Superintendent as he made his rounds by speedboat, shortly after the tug had left. It was then in *apparent* good order. A leak from a hole of

this size would cause the barge to *begin* to list in one-half hour to one hour. When next the Superintendent made his rounds, an hour to an hour and a half later, the barge was listing badly, and dumping her load of rock.

Appellants' witnesses indicated that the barge was brought toward the float at a speed of one knot or less until it was within 100 to 200 feet of the float when the power was shut off, and that tug maneuvered the barge so that the starboard forward corner of the barge approached the float. The distance traveled and the time element would indicate a somewhat greater speed.

The physical facts point to the conclusion that the tug towed the barge toward the float at a speed sufficient to cause the barge to overrun the float and that the tug's crew allowed the barge's forward way to be stopped by the mooring cable and the anchor chain of the float. No effort was made to back the tug into the barge, although the tug could readily have checked the momentum of this 1200 ton barge in this manner.

The District Court's interlocutory decree was based on evidence of negligence from the physical facts presented and the application of the doctrine of *res ipsa loquitur*. The circumstances of this case are such that a reasonable inference of negligence of the tug's crew arises. Barges, carefully and properly moored, are not holed by "U bolts" from mooring floats. The trier of fact found that appellants did not rebut this inference and that appellee met its primary burden of proof.

This finding appellee submits is not only supported by substantial evidence but is the logical conclusion to be drawn from consideration of the entire case.

ARGUMENT.

I.

The District Court's Decree Is Supported by the Strongest Presumption of Correctness.

Although an appeal in Admiralty has been traditionally described as a trial *de novo*, the decree of the District Court is presumed to be correct.

- Heder v. U. S.* (C. C. A. 9th, 1948), 167 F. (2d) 199 No. 11767 (Decided 5/5/48); 1948 AMC 12
- Bornhurst v. U. S.* (C. C. A. 9th, 1947), 164 F. (2d) 789, 1948 A. M. C. 53 (Cert den. U. S., L. Ed. (Adv.), 68 S. Ct. 789);
- Stetson v. U. S.* (C. C. A. 9th, 1946), 155 F. (2d) 359, 1946 A. M. C. 900;
- Meintsma v. U. S.* (C. C. A. 9th, 1947), 164 F. (2d) 976 1948 A. M. C. 144.

Where the evidence is partly oral and partly by deposition, the presumption of correctness is strong, but the Appellate Court will give such weight to the findings of the trial court as judicial discretion dictates.

- Tarvada v. U. S.* (C. C. A. 9th, 1947), 162 F. (2d) 615, 1947 A. M. C. 947;
- Matson Nav. Co. v. Pope & Talbot* (C. C. A. 9th, 1945), 149 F. (2d) 295, 1945 A. M. C. 767 (cert. den 326 U. S. 737, 90 L. Ed. 439, 66 S. Ct. 46);
- U. S. v. Lubinski* (C. C. A. 9th, 1946), 153 F. (2d) 1013, 1946 A. M. C. 483;
- Pac-American Fisheries v. Hoof* (C. C. A. 9th, 1923), 291 Fed. 306, 1923 A. M. C. 1180;
- The Diamond Cement* (C. C. A. 9th, 1938), 95 F. (2d) 738, 1938 A. M. C. 757.

When the testimony is entirely by deposition the case does not come to this Court "encased in its usual armor."

Johnson v. U. S. (C. C. A. 9th, 1947), 160 F. (2d) 789, 1947 A. M. C. 765. (Reversed on other grounds.....U. S....., 92 L. Ed. (Adv.) 360, 68 S. Ct. 391);

Ernest H. Meyer (C. C. A. 9th, 1936), 84 F. (2d) 496, 1936 A. M. C. 1179, (cert den. 299 U. S. 600, 81 L. Ed. 442, 57 S. Ct. 193);

The Indien (C. C. A. 9th, 1934), 71 F. (2d) 752, 1934 A. M. C. 1050.

But when, as in this case, the trial court has the benefit of oral testimony in open court, and the advantage of direct contact with the witnesses, the strongest of presumptions should and does apply. Under these circumstances this Court has many times stated emphatically that findings supported by substantial evidence not clearly erroneous, should not be disturbed.

Heder v. U. S. (C. C. A. 9th, 1948), 167 F. (2d) 899 No. 11767 (decided 5/5/48) (*supra*);

Bornhurst v. U. S. (C. C. A. 9th, 1947), 164 F. (2d) 789, 1948 A. M. C. 53 (cert den..... U. S.,L. Ed....., 68 S. Ct. 789) (*supra*);

Stetson v. U. S. (C. C. A. 9th, 1946), 155 F. (2d) 359, 1946 A. M. C. 900 (*supra*);

Mcintsma v. U. S. (C. C. A. 9th, 1947), 164 F. (2d) 976, 1948 A. M. C. 144 (*supra*);

Tawada v. U. S. (C. C. A. 9th, 1947), 162 F. (2d) 615, 1947 A. M. C. 947 (*supra*).

Appellants have indicated that the credibility of the witnesses is not here primarily under investigation (Appellants' Opening Brief p. 31). With this we can not agree because there is a definite conflict between physical evidence indicating negligence of the appellants' tug crew and their testimony inconsistent with this conclusion. The District Judge simply did not believe them [A. 213] and found that their testimony was "not convincing and cannot be accepted" [Findings, A. 25]. We do not understand just how this oral testimony, which the trial court disbelieves, can be compared to testimony by deposition. (See Appellants' Opening Brief p. 31) Credibility of witnesses is primarily the business of the District Court and the Appellate Court normally does not concern itself with this feature unless clear error is shown.

Vileski v. Pacific Atl. S. S. Co. (C. C. A. 9th, 1947), 163 F. (2d) 553, 1947 A. M. C. 1707;

Wilson v. Interocean S. S. Corp. (C. C. A. 9th, 1947), 163 F. (2d) 459, 1947 A. M. C. 1666;

Portland Stevedoring Co. v. Wegener (C. C. A. 9th, 1947), 162 F. (2d) 830, 1947 A. M. C. 1070;

Puratich v. U. S. (C. C. A. 9th, 1942), 126 F. (2d) 914, 1942 A. M. C. 611;

The Hcranger (C. C. A. 9th, 1939), 101 F. (2d) 953, 1939 A. M. C. 369;

The Mable (C. C. A. 9th, 1932), 61 F. (2d) 537, 1932 A. M. C. 1618;

The Golden Star (C. C. A. 9th, 1936), 82 F. (2d) 687, 1936 A. M. C. 692;

Lillig v. Union Sulphur Co. (C. C. A. 9th, 1937),
87 F. (2d) 277, 1937 A. M. C. 59;

The Shangho (C. C. A. 9th, 1937), 88 F. (2d)
42 1937 A. M. C. 425 (cert. den. 301 U. S. 705,
81 L. Ed. 1359, 57 S. Ct. 938);

Calachini v. Bliss (C. C. A. 9th, 1937), 88 F. (2d)
82, 1937 A. M. C. 203;

*Crozeley Launch and Tugboat Co. v. Wilmington
Transportation Co.* (C. C. A. 9th, 1941), 117
F. (2d) 651, 1941 A. M. C. 449;

Stockton Sand and Rock Co. v. Bundeson (C. C.
A. 9th, 1945), 148 F. (2d) 159, 1945 A. M. C.
659;

Drain v. Shipowners & Merchants Towboat Co.
(C. C. A. 9th, 1945), 149 F. (2d) 845, 1945
A. M. C. 892.

The second Circuit Court of Appeals, in the case of

*Petterson Lighterage and Towing Corp. v. New
York Central Railroad Co.* (C. C. A. (2d)
1942), 126 F. (2d) 992, 1942 A. M. C. 345,

has assembled a formidable appendix of authorities. The historical aspect of the “*trial de novo*” is discussed, as well as the “rubric,” of Rule 52A, *Federal Rules of Civil Procedure* (28 U.S.C.A., Sec. 723c, Rule 52A), and the effect of *Admiralty Rule 46½* (28 U.S.C.A., Sec. 723, Rule 46½).

II.

The District Court's Findings Are Not Only Supported by Substantial Evidence, But Also Are the Most Reasonable Inferences to Be Drawn From the Evidence.

A. Appellee Was Without Fault as to Loading and Trim of the Barge.

The District Court correctly found appellee to be without fault as to the manner, method or condition of loading the barge [Findings, A. 25, Conclusions of Law, A. 26]. Appellants in their answer tendered an issue of negligence as to the loading and trim of the barge when it was delivered to appellant at Catalina Island. This issue was apparently abandoned when appellants' tug captain, Reeves, testified that he had the duty not to take the barge in tow unless she was seaworthy [A. 138]. He was corroborated by witness Tomasic [A. 167]. The surveyor likewise regarded the barge as entirely seaworthy [Scheibe, A. 110, 111]. The barge had no difficulty making the channel crossing [Reeves, A. 138], nor could she have made the crossing with a hole this size in her bottom [Reeves, A. 144; Rainer, A. 99]. Were there any doubt on this score, the tug would not have accepted the tow.

B. Appellee Was Without Fault as to Maintenance of the Mooring Float.

The District Court found that appellee was without fault as to providing, furnishing or maintaining the mooring float or in any other respect [Findings, A. 25, Conclusions of Law, A. 26]. Appellants claimed that the presence of moss on the sides (not the top) of float [Gentle, A. 204] and greater "flotation" forty-eight hours after the accident [Gentle, A. 205; Tomasic, A.

160] indicated a "waterlogged" float or that the anchor chain was short. The tide had been at a flood of 4.91 feet at 11:30 p. m. and was at an ebb of .61 feet at 6:12 a. m. [stipulated fact, A. 89]. By interpolation, at 12:45 a. m., when the mooring was completed according to appellants' Log [Exhibit B; Tomasic, A. 166], the tide was at about 4.1 feet. The evidence is that the anchor chain was 75 feet long, [Jackson, A. 44] and that the water depth was about 28 feet [Jackson, A. 49] at low tide [Jackson, A. 61]: if 4 feet is added there would be about 32 feet of water. Mr. Scheibe's testimony is unchallenged that a 75 foot anchor cable is sufficient in water of this depth [A. 120]. A substantial portion of the mooring float must have been out of water to be visible to the tug master at 1,000 feet to 1,200 feet [Reeves, A. 141] and to the deckhand at about 750 to 1,000 feet [Tomasic, A. 172, 157]. The inference appellants draw that the float was low in the water, with one corner down [Tomasic, A. 160], because of a short anchor line is less probable than the inference appellee urges that the float was then being drawn under water by the slow forward motion of the barge as its momentum pushed the float ahead. This action would tend to lift the anchor chain from the bottom and place greater weight on the float. When the anchor chain became taut the float would be and was pulled below the rake of the barge. In no other way could a float, four feet thick be drawn below a barge whose draft was nine feet. It is to be noted that the next day [Gentle, A. 197] or 48 hours later [Gentle, A. 205] when Gentle saw the float, a bulkhead of 4 x 4's had been built around the U bolt in an effort to prevent repetition of this damage to any other barges towed over the float. If it is true that there was then greater "flotation" to

this same float, it could hardly have been "waterlogged." Even if it be granted, for the sake of argument, that the float was awash or nearly so [Tomasic, A. 160] we can see no material bearing this has on the case. The float was four feet thick, the barge had a nine foot draft. Under the circumstances as stipulated, it was impossible for the barge to have been forced on the float by ordinary conditions of wind and current [Scheibe, A. 109]. Perhaps the best evidence that the float was a proper mooring is the fact that appellants' crew moored the barge to it without hesitation. Surely appellants will not now seriously advance the theory that their crew were negligent in leaving the barge at an unsafe mooring without a word of protest or warning.

C. The Court Properly Found Appellants at Fault.

The District Court correctly found that appellants were negligent with respect to maneuvering the tug, approaching the float at an excessive speed, causing the barge to override the float and failing to stop the barge or to take measures to prevent the barge from overriding the float [Findings, A. 25; Conclusions of Law, A. 26].

**1. THE BARGE WAS TOWED AT EXCESSIVE SPEED AS IT
APPROACHED THE FLOAT.**

As to speed, the only direct testimony comes from the three crew members of the tug. They say three-fourths to one knot [Reeves, A. 139], one knot [Tomasic, A. 152, 155, 156] two knots before turning the barge over to the Dispatch and one knot thereafter [Tomasic, A. 168] one-half to three-fourths of a knot [Gentle, A. 195,

202]. The accuracy of these estimates, and of the estimates at the actual time of the mooring, can well be questioned. A considerable greater speed is indicated by the elapsed time shown in the Log [A. 166, Respondents Exhibit B], and the distance traveled. From 11:30 p. m. when the tow cleared the breakwater, east entrance, to clearing the net was ten minutes. At 12:10 a. m. the tow reached the point where the other barge was turned over to the tug DISPATCH. This was estimated at about two miles [Tomasic, A. 151] and took forty minutes, including the time at the gate [Tomasic, A. 168]. The average speed for this distance is at least three knots. From 12:10 a. m. to 12:45 a. m., thirty-five minutes, the ROCONA shortened line, towed the barge to the float and moored it. Fifteen minutes is required to develop sufficient air to operate the air winch [Gentle, A. 192]. Without considering any time for shortening the line from 540 feet [Gentle, A. 190] to about 60 feet [Gentle, A. 192] there remains about twenty minutes to go from G1 to G3 [Libelant's Exhibit 4] a distance estimated at about one mile [Gentle, A. 195]. This averages to a three-knot speed. Aside from these computations, we have direct evidence of too much speed from the scratch and hole, a distance from the Samson post equal to the length of the mooring cable. This shows that the barge approached the float with sufficient speed to overrun the float and still had sufficient momentum to come up sharply against the float and its anchor and with enough force to punch a hole through two 4-inch by 12-inch planks.

2. THE TUG WAS IMPROPERLY MANEUVERED INTO AND OVER THE FLOAT.

As to maneuvering the tug, Reeves states that he shut off power when he was 100 feet [Reeves, A. 132] or 100 to 150 feet from the float [Reeves, A. 142], and let the barge drift ahead. Tomasic indicates that the power was shut off when the barge was 200 feet from the float [Tomasic A. 157] although on cross-examination [A. 172] the estimate was reduced to between 100 to 200 feet. Gentle states that the tug “dropped tension at approximately 100, 150, 200 feet away with slight maneuvers to get her to head in the correct position” [Gentle, A. 196, 201] and that it would be unusual for the barge to run “directly in a direct line to the float,” without such supplementary maneuvering [Gentle, A. 202]. Although there are several references to the barge being “dead in the water,” the barge had way and was moving into the float, pushing it along ahead of the barge. The expression “dead in the water” included forward motion of the barge [Tomasic, A. 174]. Tomasic admitted that the barge was “almost at a dead stop” [A. 172] and Gentle stated that it was customary to approach a mooring float at “almost a dead stop with only just slight way on” [A. 203].

It is understandable that at night it might well be difficult to distinguish between moving slowly and a complete absence of forward motion in the water. A tug captain always approaches the float upwind [Tomasic, A. 177]. Although the wind was negligible and the ordinary currents existed [Pretrial Stipulation, A. 18; Tomasic, A. 156], in all probability the float would be resting to the down wind or down current side of the anchor to which it was affixed by a 75-foot chain or metal cable [Jackson, A. 43, 44]. The float would then be some fifty or sixty

feet from the anchor. The barge could readily push the float ahead of it, into the area upwind of the anchor, a distance of some sixty-five to seventy feet from the anchor before the anchor chain would be drawn taut, and the float actually pulled under water. During the time the barge moved slowly over this distance of from 115 to 130 feet, it is understandable that the tug's crew might well not realize that they were moving as the gross tonnage of 1,200 tons was slowly decelerating. No effort was made by the tug to "back down against" the barge, [Reeves, A. 134]. If the average rate of speed during the deceleration period was one-half knot, or fifty feet per minute, it would take approximately two and a half minutes from the time the rake of the barge reached the float until the scope of the anchor chain was reached. Another minute or so would be required for the barge to reach the end of the mooring cable. Reeves states that the entire operation of mooring took approximately five to ten minutes [Reeves, A. 136] including presumably the elapsed time from the point where power was shut off, as the barge approached the float, until the time the tug made a circle of the barge and started for Berth 94 [Reeves, A. 135]. Tomasic stated that it took him 5 to 10 minutes [A. 159] to raise the wire. These estimates of time do not purport to be exact. It could equally have been two or three minutes or less. Part of Tomasic's "difficulty" was undoubtedly due to the fact that the float was being pushed ahead of the barge for several minutes before it was drawn under water.

If the barge pushed the float slowly through the water from one side of the anchor to the other, it is understandable that one side or corner would go under water. The float as it neared the end of the anchor chain would ride

lower in the water as the entire scope of the anchor chain was drawn from the bottom and the float was called upon to support a greater weight. When the anchor chain was drawn taut, the far end of the float would naturally be drawn under water first. Tomasic recalls that one of the corners was under water [Tomasic, A. 160] but is not sure whether it was at the near or the far side [A. 181]. It is conceded that no steps were taken to stop the barge. Reeves states that if he desired to "back down against" the barge he would have rung two bells [Reeves, A. 146] and he "could have backed the barge clean away from the mooring float," but that he did not do so [Reeves, A. 134]. The same implication appears from Tomasic's testimony [A. 163]. It is unlikely that these men, who were working on a salary [Tomasic, A. 183], would be over-anxious to spend more than a bare minimum of time after midnight, Saturday night, stopping a barge which they had brought up too fast. The attitude shown in the testimony of Tomasic [A. 186, 187] that pulling a barge over the float was not "unusual" and "it happens" is entirely consistent with letting the barge stop herself against the mooring float anchor, despite the danger of damage [Tomasic, A. 176, 177].

There are several references to the likelihood of damaging the barge. Jackson [A. 54] indicates that, if the barge comes in with too much momentum, the pendant can be broken or the mooring float can be pulled under the barge and a hole punched in the bottom when the barge "comes up with a jerk" against the mooring or it can override the mooring or "pass over the top of the float." Tomasic appreciated that there was danger of breaking the anchor chain or the Samson post [A. 177]. He also indicated [A. 174] that a barge described as "dead" al-

ways has some motion and that he himself made the decision as to whether to drop the mooring cable or to put it on the bitt when the master brought in a barge too fast.

D. The Damage Was Caused When and Because the Barge Was Towed Over the Float. There Is No Other Reasonable Explanation.

The District Court's finding that the ROCONA caused the barge to override the float and failed to take measures to keep the barge from overriding the float is amply supported by the evidence. Under ordinary conditions of surge and current, with a negligible wind [see Pretrial Stipulation, A. 18], it was impossible for the barge to have overridden the float unless some outside force was applied to it [Jackson, A. 55; Scheibe, A. 109, 111, 112]. Tomasic testified flatly that the tug did not pull the barge over the float [A. 162]. Reeves was considerably less positive [A. 134]. Gentle would not commit himself [A. 197].

Jackson estimated that he first saw the barge from the speedboat at about 12:30 a. m. and within an hour or hour and a half she was discovered to be listing "quite badly" [Jackson, A. 49, 50], because of a leak through a hole the approximate dimensions of the "U bolt" of the float [Pretrial Stipulation, A. 18, 19; Jackson, A. 51; Bach, A. 82; Raimer, A. 87; Scheibe, A. 106]. The surveyor states that the barge would *begin* to list a half hour to an hour after being so damaged [Scheibe, A. 110]. A scratch, some seven or eight feet long [Scheibe, A. 106; Bach, A. 78] extended forward from the hole. The after portion of the scratch was deeper and wider than the forward portion. At the hole it was about 2 inches wide and one-half to one inch deep [Scheibe, A. 107; Bach, A. 78].

The hole was about the same distance from the Samson post, 40 to 50 feet [Bach, A. 79], measured around the rake of the barge [Jackson, A. 44], as the length of the mooring cable. Tomasic estimated that the cable was shorter than usual, 35 to 40 feet [Tomasic, A. 159], but on cross-examination indicated that the cable was 40 feet in length [Tomasic, A. 179]. If the cable appeared shorter, it would not be inconsistent with the thought that the mooring float had already been drawn partially under the barge when he reached the end of the cable and slipped the eye over the Samson post. Jackson states definitely that in his opinion the barge overran the mooring float and "when the mooring pendant came up (*i. e.* when the barge reached the end of the mooring pendant and the anchor chain) it turned the barge (mooring float) up, the U bolt punched a hole in it" [Jackson, A. 56]. The surveyor states that in his opinion the barge overrode the mooring float and that "the eye—the 'U' bolt punctured the bottom planking" [Scheibe, A. 107]. The bottom planking was four inches thick by 12 inches wide [Bach, A. 77; Scheibe, A. 106]. Punching a hole through this sturdy construction must have required application of considerable force, such as the momentum of 1200 tons [Ramier, A. 95] moving slowly and irresistibly into and over the float. This considerable weight was not halted until it pulled the mooring cable and anchor chain taut. The deepening scratch is consistent with the barge still having substantial way when it reached the end of the mooring cable. The District Court decided that these

physical facts spoke louder than the words of the witnesses [Oral Decision, A. 213].

The language in the Second Circuit case of

F. E. Grauweiler Trans. Co. v. Gallagher Bros. Sand & Gravel Co. (C. C. A. (2d) 1946), 153 F. (2d) 384, 1946 A. M. C. 221.

is particularly appropriate:

“Granting that the scow struck a mooring block, there can be no real question but that it was due to the negligence of the tug.”

III.

The Trial Court Correctly Applied the Doctrine of Res Ipsa Loquitur in Concluding That Appellants Were Negligent.

The barge was in the exclusive control of appellants. The tug was operated and manned by appellants' employees. No employee of appellee was on the barge or tug [Pretrial Stipulation, A. 17; Raimer, A. 101]. Appellants' suggestion that Raimer who was at home [Raimer, A. 84], probably in bed, when the barge was damaged, had general supervision over the barges, and therefore appellants did not have “exclusive control” of the barge, is hardly a realistic approach. The search is for the negligent party in this type of case. The question asked is, “Who had the opportunity to be negligent under these circumstances?” We can readily eliminate Raimer. We can also eliminate the action of the tides and currents, because it was not only improbable but *impossible* for the barge to have overridden the float without outside force or motive power being applied [Scheibe, A. 109; Jackson,

A. 55] under ordinary conditions of wind current, tide and surge. At the time of the accident the wind was negligible and the ordinary currents and surges were present [Pretrial Stipulation, A. 18; Jackson, A. 71, 72]. Examination of the time element requires the conclusion that the barge was damaged when she was moored. The barge would *begin* to list within a half hour to an hour after receiving the damage she sustained [Scheibe, A. 110]. Jackson inspected the barge “shortly, very shortly after it came in” [Jackson, A. 49] and an hour or an hour and a half later she was discovered to be listing “quite badly” [Jackson, A. 50], due to a leak from a hole the size and shape of the “U bolt” [Jackson, A. 51; Bach, A. 78; Raimer, A. 87; Scheibe, A. 106, 107], in the bottom of the barge a distance from the Samson post equal to the length of the mooring line of the float [Bach, A. 79; Jackson, A. 44], measured around the rake of the barge.

This leaves only the suggestion, which appellants have not seriously advanced, that a passing ship could have been the outside motive force necessary to impel the barge upon the float with sufficient force to punch a hole through the four inch by twelve inch planking. Considering that the barge’s gross weight was 1,200 tons [Raimer, A. 95], her draft was nine feet [Raimer, A. 100, 103] and about three feet of the float was under water, we can appreciate that a wave far beyond any conceivable wash from a passing vessel would be required. Such a wave would surely have caused considerable damage to harbor installations. Had it occurred, appellants would certainly have seized upon it as the explanation required by these circumstances.

A barge, carefully and properly moored, does not ordinarily have a hole punched in her bottom by the “U bolt”

of a mooring float. Unexplained, the facts alone warrant the inference of negligence of appellants.

Johnson v. U. S. (1948), U. S., 92 L. Ed. (Adv.) 360, 68 S. Ct. 391, 1948 A. M. C. 218;

Jesionowski v. Boston & Maine R. Co. (1947), 329 U. S. 452, 91 L. Ed. 416, 67 S. Ct. 401;

Sweeney v. Erving (1913), 228 U. S. 233, 240, 57 L. Ed. 815, 33 S. Ct. 416.

While it is impossible to do more than speculate as to the precise manner in which the damage was caused, it is clear that the float was under the barge and that the “U bolt” punched a hole through its four-inch bottom planking. Raimer indicates [A. 95] that the float, when it was pushed to the end of the anchor line would be drawn under the rake of the barge in a vertical position; the barge would continue forward until the mooring cable became taut and the 1,200 ton momentum would “snap” the float into the bottom of the barge. Another possibility could be that the float tumbled as it went under the barge so that when the barge’s forward momentum was stopped, the float was upside down, and the bottom “U bolt” was punched through the planking. In either event the scratch and gouge leading to the hole are conclusive that the barge had substantial way at the time of the damage, when and as this damage was done.

The District Court at the close of counsels’ arguments stated [A. 211, 212] that the issue was one of fact for the Court and it would weigh the appellee’s circumstantial evidence together with any inference to be drawn from the *res ipsa loquitur* doctrine against testimony of appellants’ witnesses. The District Court, in its oral opinion [A. 213] and Findings of Fact [A. 24, 25] found that the

physical evidence outweighed the oral testimony. Appellee's position is that this finding is entirely correct.

The discussion of the doctrine of *res ipsa loquitur* in Appellants' Opening Brief is entirely inconsistent with the Supreme Court's exposition of the doctrine as expressed in the *Johnson* case,

Johnson v. U. S. (1948) (*supra*), U. S., 92 L. Ed. (Adv.) 360, 38 S. Ct. 391, 1948 A. M. C. 218.

The Court quoted from the *Jesionowski* case

Jesionowski v. Boston & Maine R. Co. (1947) (*supra*), 329 U. S. 452, 91 L. Ed. 416, 67 S. Ct. 401,

which applied the rule of

Sweeney v. Erving (1913) (*supra*), 228 U. S. 233, 57 L. Ed. 815, 33 S. Ct. 416,

and said,

"The rule of *res ipsa loquitur* applied in *Jesionowski v. Boston & Maine R. Co.*, *supra*, means that 'the facts of the occurrence warrant the inference of negligence not that they compel such an inference.'"

There is no conflict in the legal principles applied in the *Johnson* case by the Supreme Court with the analysis of the doctrine by this Court in deciding that case.

Johnson v. U. S. (C. C. A. 9th, 1947) (*supra*), 160 F. (2d) 789, 1947 A. M. C. 765.

The difference in result was simply because the Supreme Court determined that the "facts of the occurrence" showed negligence of the fellow servant and this Court found that the "circumstances of this case are not such to justify a finding . . . of . . . negligence."

Appellee, of course accepts the propositions that the mere proof of an "accident" does not raise a presumption of negligence, and that the ultimate burden of proof remains with the party seeking recovery.

The inference of negligence to be drawn from consideration of all of the circumstances of this case was sufficient to place upon appellants the burden of going forward. Appellants went forward by offering the testimony of the tug crew. The case, were it before a jury, would then go to the jury, where the evidence would be weighed. The District Judge, here acting as a jury [A. 212], weighed the inference of negligence from appellee's evidence against the inferences to be drawn from appellants' evidence and found appellants' evidence incredible, unconvincing and unacceptable.

Appellants in their brief seem to object to the Court's "deductive process" and imply that the inference from the doctrine is not evidence properly to be considered with the other evidence in the case. This "process" is entirely proper. The Supreme Court has said unmistakably that the inference from the doctrine is evidence to be weighed by the fact finder.

Sweeney v. Erving (1913) (*supra*), 228 U. S. 233, 240, 57 L. Ed. 815, 33 S. Ct. 416, 418.

"In our opinion *res ipsa loquitur* means that the facts of the occurrence warrant the inference of negligence, not that they compel such an inference; that they furnish circumstantial evidence of negligence where direct evidence of it may be lacking, *but it is evidence to be weighed* not necessarily to be accepted as sufficient; that they call for explanation or rebuttal, not necessarily that they require it; *that they make a case to be decided by the jury*, not that they

forestall the verdict. *Res ipsa loquitur*, where it applies does not convert the defendant's general issue into an affirmative defense. *When all the evidence is in, the question for the jury is whether the preponderance is with the plaintiff.*" (Italics added.)

In this case, the District Court has found that appellee has met its burden to produce a preponderance of evidence. Appellants' argument resolves itself into disagreement with the result reached by the trier of the facts.

The case of

Liggett & Myers Tobacco Co. v. DeLape (C. C. A. 9th, 1940), 109 F. (2d) 598,

is similar in mechanics to this case. Plaintiff proved a set of circumstances (an exploding cigarette from a newly opened package) from which the reasonable inference of defendant's negligence followed. Defendant said, in effect, what appellant says here: "I was not negligent." Detailed testimony was offered as to the care used at all times including the time the defective cigarette was manufactured. The Court held that the inference arising from *res ipsa loquitur* retained its vitality after defendant had gone forward with the evidence and that the inference was still sufficient to support plaintiff's burden of proof. (See also the case of *Hurt v. Susnow* (1948), 85 A. C. A. 251, in which the inference of negligence raised by the *res ipsa* doctrine was held to be evidence and the inference was not rebutted by testimony of an interested party.)

Similarly here, the District Court has refused to accept appellants' version which merely denies negligence but offers no plausible explanation of the damage to the barge inconsistent with negligence of the tug's crew.

IV.

Conclusion: The Decree Should Not Be Disturbed.

Appellants' sole defense to this action is merely a denial by its employees that they were at fault.

The District Court found this disclaimer unconvincing and not acceptable [A. 25, 213]. There is substantial evidence to support this finding. The Court's decision is not only not clearly erroneous, but also the most probable inference to be drawn from the evidence. It should not be disturbed.

Respectfully submitted,

McCUTCHEN, THOMAS, MATTHEW,
GRIFFITHS & GREENE,
HAROLD A. BLACK,
GEORGE E. TONER,

Proctors for Appellee.

